

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
Implementation of Section 302
of the Telecommunications Act of 1996

Open Video Systems

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CS Docket No. 96-46

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NYNEX PETITION FOR RECONSIDERATION

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SUMMARY

NYNEX applauds the Commission's OVS Order for taking great strides towards creating a regulatory framework designed to encourage and facilitate local exchange carriers and others in the establishment of open video systems ("OVS"). In doing so, it has properly rejected proposals to burden OVS with substantial front-end requirements, detailed rate regulations, municipal "franchise-like" controls, and prohibitions on joint marketing and provisioning, any of which would -- if adopted -- have substantially diminished the prospects for this new mode of potential wireline video service competition. Importantly, the OVS Order also begins the necessary process of unlocking the anticompetitive constraints cable companies exert over current video programming, whether by affiliation or by preclusive use of their monopolistic leverage.

NYNEX does not wholly agree with each decision made in the OVS Order, yet we ask for reconsideration only in two respects. Each goes beyond the statute to place, or threaten to place, OVS programming providers affiliated with the operator at a competitive disadvantage vis-à-vis non-affiliated programming providers.

First, the OVS Order authorized the imposition of fees by state authorities based in part on the gross revenues of affiliated programmers, although the statute confines such fees to the gross revenues of the operator. The Commission should remove this discriminatory burden by modifying its decision to authorize such fees

only on the revenues of the OVS operator from serving all OVS programming providers, whether affiliated or not. Only in this manner can the Commission fulfill the Congressional intent “to ensure parity among providers.”

Second, the OVS Order imposes the non-discrimination provisions of Section 653(b)(1)(E)(iv), relating to navigational devices, guides and menus, on the affiliated programming provider as well as the OVS operator. This determination extends the burden of serving OVS program providers beyond the operator, where it is placed by statute, to the affiliated program provider. If unchanged, it will lead the Commission into the task of refereeing disputes between competitive peers, affiliated and unaffiliated programming providers. This result would be inconsistent with reduced regulation, would invite regulatory tactics in lieu of marketplace competition, would delay OVS rollout, and would consume limited Commission resources. Most importantly, the application of such requirements to affiliated programming providers is entirely unnecessary to accomplish the goals of the Commission and the Congress. Instead, the Commission should join Congress by modifying the OVS Order to place these non-discrimination obligations solely on the OVS operators, and not on competitive programming providers, whether or not affiliated with the operator.

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Open Video Systems)	

NYNEX PETITION FOR RECONSIDERATION

NYNEX Corporation (hereafter "NYNEX") hereby submits its Petition For Reconsideration, pursuant to Rule 1.429 (47 C.F.R. §1.429), of the Second Report And Order ("OVS Order"),¹ released June 3, 1996, in the above-referenced proceeding.

I. INTRODUCTION

The Commission has taken great strides forward in the OVS Order towards creating a regulatory framework designed to encourage and facilitate local exchange carriers ("LECs") and others in the establishment of open video systems (OVS) which are a new choice for potential wireline service competitors to cable. Specifically, it eschewed substantial front-end regulatory requirements which would have delayed service establishment; it established a limited rate regulation

¹ In the Matter of Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems, FCC 96-249, Second Report And Order, CS Docket No. 96-46 (released June 3, 1996).

scheme tailored to OVS as a “new entrant” service; it rejected proposals for municipal intervention which would have permitted indirect franchise-like controls to choke off widespread OVS deployment; it turned back cable company proposals to bar the economically efficient joint marketing and provisioning of telephone and OVS services; and it took the first necessary steps towards loosening the program access constraints which the cable companies have been able to use anticompetitively against prospective new entrants, whether as a result of ownership affiliation or economic leverage. Each of these steps was thoroughly consistent with both the statutory terms of the Telecommunications Act of 1996 (“1996 Act”) and with the Congressional judgment that “reduced regulatory burdens ... [for] open video systems” are appropriate in order to “encourage common carriers to deploy open video systems and introduce vigorous competition in entertainment and information markets.”²

A number of NYNEX’s positions were accepted in the OVS Order. Although others were rejected, we applaud the decision and the Commission’s willingness to chart a new path along the overall pro-competitive, deregulatory

² Telecommunications Act of 1996, Conference Report, S. Rep. 104-230 at 178 (February 1, 1996) (“Conference Report”).

approach adopted.³ Accordingly, NYNEX does not seek wholesale reconsideration of all its arguments. Instead, we propose reconsideration of the decision in two specific respects:

- (1) that the OVS Order be modified to require the payment of fees by OVS operators based on the gross revenues of OVS operators only, not on the revenues of the OVS video programming providers, whether affiliated or unaffiliated; and
- (2) that the OVS Order be modified by applying the statutory requirement of nondiscrimination in the provision of program menus, guides and channel selection (navigation) capabilities solely to the OVS operator, and not to any OVS video programmer, whether affiliated or unaffiliated.

As discussed below, these modifications to the OVS Order will enhance the overall prospects for OVS implementation and success in competition with incumbent cable companies (which largely face no wireline competition today) and balance the commercial opportunities provided for intra-system video programming competitors.

II. OVS FEES SHOULD BE PAID ON THE GROSS REVENUES OF THE OPERATOR, RATHER THAN THE REVENUES OF VIDEO PROGRAM PROVIDERS, WHETHER OR NOT AFFILIATED WITH THE OPERATOR

Perhaps no other section of the OVS statutory provisions is given to greater uncertainty than the payment of fees section (Section 653(c)(2)(B)). At least four

³ Of course, it is equally essential that the Commission adopt this same approach in other critical dockets relating to LEC provision of competitive video services; e.g., its proceeding on video service cost allocations. Otherwise, the promise of this new competitive opportunity may be unrealized.

alternative views of the statutory requirement can be argued with some persuasiveness. These include the payment of fees based on:

- (1) the gross revenues of the OVS operator from providing service to all OVS video programming providers (whether affiliated or unaffiliated);
- (2) the gross revenues of the OVS operator, if any, from providing its own video programming service;
- (3) the gross revenues of all OVS video programming providers (whether affiliated or unaffiliated); or
- (4) the gross revenues of the affiliated OVS programming provider and the gross revenues of the OVS operator from providing OVS service to all other non-affiliated OVS video programming providers.

In these circumstances, the Commission should adopt the alternative that is most consistent with the statute, Congressional direction, its own pro-competitive policies, and simple fairness --alternative (1) above. Instead, the OVS Order has adopted alternative (4) above.⁴ In doing so, it has gone beyond the statute to require the payment of fees on the revenues of the affiliated OVS video programming provider (rather than the operator), and it has not further placed an equal competitive burden on unaffiliated OVS video programmer providers (most likely out-of-area cable companies). This is, perhaps, the least pro-competitive approach. The Commission need not, and should not, handicap the competitive provisioning of OVS video programming in this manner. It would be far more equitable if, in keeping with the Commission's own pro-competitive approach and

⁴ OVS Order at para. 220.

the statute itself, the fees were to be paid only on the services provided to all video service programmers by the OVS operator.

A. The Statute Does Not Support The Imposition Of Fees On The Affiliate

There is no question that the 1996 Act requires the payment of fees on the gross revenues of the OVS operator (Section 653(c)(2)(B)). In relevant part the statute provides:

“Fees - An operator of an open video system under this part may be subject to the payment of fees on the gross revenues of the operator for the provision of cable service imposed by a local franchising authority or other governmental entity, in lieu of the franchise fees permitted under section 622.” (Emphasis added.)

The issue focuses then on which revenues are subject to the statutory “fees.” The OVS Order concludes that the payment of fees are due from the “gross revenues received by an open video system operator or its affiliates, including all revenues received from subscribers and all carriage revenues received from unaffiliated video programming providers.”⁵ But, this view fails the statutory

⁵ Id. Importantly, although the Commission references a proposal by the National League of Cities to include advertising revenues in the calculation of gross revenues, it does not include them in describing the “gross revenues” to be included in either the OVS Order (para. 220) or the accompanying rules (47 C.F.R. 76.1511). The only discussion of NLC’s proposal is to exclude such revenues specifically (along with subscriber revenues) for non-affiliated programming providers. Similarly, both types of revenues should be excluded for affiliated programmers in order to maintain programmer parity, as discussed infra. Moreover, the advertising revenues of the affiliate must be treated as such by law (e.g., in the application of taxes); they are not among the “gross revenues of the operator” as encompassed in the statute. Nor are the advertising revenues of the operator, if any, part of its “provision of cable service.”

test which relates the fees only to the gross revenues of the operator, not of its video service programming affiliate -- a distinction Congress has consistently drawn with great clarity in other provisions of this very statutory section.⁶ Further, it is instructive that earlier versions of this statutory provision were express in their inclusion of “provider[s] of video programming” in the payment of fees authorization.⁷ However, these were not adopted as the statutory scheme by Congress or signed into law by the President . Rather, the final statutory language speaks only to “the gross revenues of the operator”; there is no authority to base the payment of fees on the revenues of the affiliate or, indeed, of any video programming provider.⁸

Similarly, reading the statutory phrase “the gross revenues of the operator for the provision of cable service” to encompass the operator and the affiliate, if they each provide different elements of “cable service,” would also not be

⁶ See, e.g., Section 653(b)(1)(B) addressing “an operator of an open video system and its affiliates” (emphasis added), as well as Section 653(c)(4) addressing only “video programming providers,” not the operator.

⁷ Senate Act S.652 at Section 202(a), amending 47 U.S.C. 533(b), subsection (b)(5). See, also House of Representatives enactment, H.R. 1555, at Section 656(b)(2) stating that fees are payable by “[a] video programming affiliate of any common carrier that establishes a video platform under this part, and any multichannel video programming distributor offering a competing service using such video platform” (emphasis added).

⁸ Alternative view (3), which would calculate fees based on the gross revenues of all OVS video programming providers, also fails on this ground, although it would be more equitable than the imposition of fees only on video programmers affiliated with the OVS operator.

consonant with the distinctions carefully drawn elsewhere between the operator and its affiliates. These are separate legal entities. The Commission is not empowered to ignore distinctions of corporate organization which are fundamental to our economic and legal system, in order to include the revenues of affiliates with those of the operators.⁹

**B. Congress Did Not Intend The OVS Rules To Discriminate
Against Affiliated OVS Programming Providers**

The clear Congressional direction was that the LECs should be recognized as “new entrants” into this currently monopolized market, and accordingly should be “encouraged” to provide OVS.¹⁰ Nevertheless, while Congress specified a reduced regulatory scheme for OVS, it still required non-discrimination in the treatment of unaffiliated OVS video service providers. Here the Commission’s approach is unfair with respect to the affiliate’s programming services. That is, the affiliated programming provider will have its subscriber revenues subject to the payment of the full “franchise-like” fee, while unaffiliated OVS video programmers will have only their OVS carriage costs subject to the fee. There is

⁹ In any event, adoption of alternative view (2) above, which would impose fees on the OVS operator for providing cable service, would also create the prospect that neither the OVS operator (which refrains from providing programming itself), nor any other OVS programming provider (which is not the operator) is subject to the payment of fees. At the very least, assuming the OVS operator chooses to provide cable service, this approach would be inequitable in that only one programmer must pay.

¹⁰ Conference Report at 178.

nothing in the Congressional direction to require such a discriminatory approach.

On the contrary, Congress specifically indicated that its intent was “to ensure parity among video providers.”¹¹

C. The Best Approach Is To Require The Payment Of Fees On The Gross Revenues Of The OVS Operator From Providing Service To OVS Video Programming Providers

Given the statutory and policy infirmities of the approach adopted in the OVS Order, and in alternatives (2) and (3) discussed above, the best approach would be to provide for the payment of fees on the gross revenues of the OVS

¹¹ Id. Moreover, implementation of this approach may also lead to the violation of the constitutional rights of the affiliated programmer to the equal protection of law. Initially, the Commission’s decision may not have any immediate adverse effect on operator-affiliated OVS programming providers, because: (i) it only indicates the basis on which a State, municipality or other governmental entity may assess the payment of fees; and (ii) it does not preclude the recovery of assessed fees (however determined) by the OVS operator from all programming providers. However, if State authorities assess the fee *as authorized by the OVS Order* and if such fees are subsequently determined to be the sole burden of the affiliated provider, the resulting scheme of taxation will likely fail constitutional challenge given that the only distinction between such OVS providers is their status of affiliation. Unlike the clear distinctions made by Congress between cable service and OVS service, none of the OVS programming providers themselves will likely differ from each other in their business, property or even corporate form. Therefore, for a State authority to visit unequal economic burdens on them would be fundamentally “arbitrary and capricious” and not “rationally related” to any State objective. See, Allegheny Pittsburgh Coal Co. vs. County Commissioner, 488 US 336 (1909) (finding a constitutional requirement of rough equality in the tax treatment of similarly situated property owners); see, also, Charleston Fed. Savings & Loan Assoc. v. Alderson, 324 US 182, 190 (1945) (the Equal Protection clause applies “to taxation which in fact bears unequally on persons or property of the same class.”). The Commission should not lead the parties to this proceeding down this course, especially where Congress itself did not.

operator from providing OVS service to the various OVS video programming providers (alternative (1)). First, this approach applies the payment of fees to the OVS operator as directed by statute, not to various OVS programming providers (whether affiliated or non-affiliated). Second, it ensures the payment of fees whether or not the OVS operator or an affiliate provides OVS video programming over a particular system. Third, it avoids placing a discriminatory burden upon the affiliated OVS video programming provider, contrary to statutory terms and Congressional intent, as well as the Commission's own pro-competitive policies.

The better approach would be to provide for the payment of fees only upon the OVS operator, as contemplated by statute¹² This would "ensure parity among video providers," as directed by Congress.¹³ Thus, considerations of both policy and law warrant modification of the OVS Order to adopt this far better approach.

¹² NYNEX anticipates the cable company competitors may argue that "exemption" of the affiliated OVS programming provider from such payment of fees will discriminate against them, insofar as cable service franchise fees are based on subscriber revenues. The Commission should not be persuaded by such arguments for "parity" between OVS and cable systems because OVS operators have different and additional burdens to bear (*i.e.*, furnishing up to two-thirds of their capacity to others). If the incumbent cable company believes that there is an imbalance of burdens and benefits between cable systems and OVS, it is free to provide OVS itself. OVS Order at para. 12. NYNEX has never argued against such competition. Further, under the approach adopted by the OVS Order, out-of-area cable companies providing programming over the OVS would enjoy an artificial and unwarranted advantage over OVS operator-affiliated programming providers on the same OVS. Indeed, the cable companies fortuitously avoid the burden they themselves would have incurred if they had chosen to provide cable competition in the service area. This would be patently poor policy.

¹³ Conference Report at p 178.

III. THE NONDISCRIMINATION PROVISIONS OF SECTION 653(b)(1)(E)(iv) OF THE ACT APPLY TO OVS OPERATORS, NOT TO OVS VIDEO PROGRAMMING PROVIDERS

There is some confusion within the OVS Order concerning the obligations of OVS operators and OVS programming providers concerning the statutory requirement for nondiscrimination in the provision of navigational devices, guides and menus.¹⁴ The OVS Order should be modified on reconsideration.

First, the Commission was persuaded by the argument that the OVS operator “is not relieved of the nondiscrimination provisions of Section 653(b)(1)(E)(iv) if the operator offers a navigational device that works only with affiliated video program packages.”¹⁵ Second, the Commission finds that “the open video systems operator should not be able to evade its obligation to ensure that other non-affiliated programming providers are represented on a navigational device, guide or menu simply by having the service nominally provided by its affiliate.”¹⁶ However, to backstop these findings, the Commission also states that OVS affiliated program providers are “subject to the non-discrimination requirements regarding the provision of navigational devices.” This latter

¹⁴ OVS Order at paras. 224-232.

¹⁵ OVS Order at para 231

¹⁶ Significantly, this “representation” requirement is properly limited to those circumstances where there is only a single navigational device available on the system. OVS Order at para. 224. There are already clear indications that many such devices will be available.

statement is incorrect as a matter of law. That is, the statute clearly places the nondiscrimination requirement only on the OVS operator (Section 653(b)(1)(E)(iv)). As importantly, it is neither required nor advisable as a matter of policy.

It appears that the source of the Commission's greatest concern is the strawman it first knocks down, i.e., that the OVS operator will discriminate by offering navigational devices that work only with the affiliate's programming, essentially precluding OVS subscriber access to any other programs or programmer. Alternatively, the OVS Order seeks to apply the same non-discrimination requirement to the affiliated programming provider, in the event the OVS operator itself does not provide any navigational device.

These concerns are unwarranted. There is no plan to preclude subscriber access to non-affiliated programming. On the contrary, NYNEX understands that -- as an OVS operator -- it must provide for access to such programming on a non-discriminatory basis. We will do so by preparing a competitively neutral listing of all programmers on the OVS. This listing will be provided to all programmers for their required transmission to their subscribers, along with such PEG and must-carry programming as are required over the OVS.¹⁷ The listing will be available to the customers of all OVS programming providers, and will also include

¹⁷ OVS Order at para. 153.

information on how to contact other programmers to subscribe to their programming.¹⁸ In addition, we will provide all OVS program providers with the technical specifications necessary to develop program guides and navigational devices of their own choosing. This will facilitate intra-system competition among providers for attractive and customer-friendly presentation formats and channel navigation.

Given these obligations of the OVS operator, Congress properly avoided placing Section 653(b)(1)(E)(iv) requirements on any of the OVS video programmers, whether affiliated or not with the OVS operator. It would not be sound policy for the Commission to reverse this judgment and to establish requirements instead *between providers*. Such a policy will inevitably lead the Commission into the regulatory task of refereeing disputes between competitive peers, the providers. This would be inconsistent with reduced regulation, would invite -- rather than discourage -- regulatory tactics in lieu of competition, would delay OVS rollout, and would consume limited Commission resources.

Most importantly, the application of such requirement to affiliated programming providers is entirely unnecessary to accomplish the goals of the Congress and the Commission. Instead, the Commission should join Congress in placing these non-discrimination obligations solely on the OVS operators, and

¹⁸ See, OVS Order at para. 230.

specifically advise that they are not visited on the competitive programming providers, whether or not affiliated with the operator.

IV. CONCLUSION

Overall, the OVS Order goes far towards establishing a reduced regulatory regime which will encourage LECs to build Open Video Systems. NYNEX commends the Commission on this progress. Nevertheless, there are specific terms of the OVS Order which, unless modified, would handicap the OVS affiliated programming provider *vis-à-vis* its intra-system competitors, without statutory authority or sound policy rationale. NYNEX urges that the Commission reconsider the OVS Order, as described above. In so doing, it will best advance the objectives of Congress and of its own pro-competitive policies.

Respectfully submitted,

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Dated: July 5, 1996

CERTIFICATE OF SERVICE

I, Yvonne Kuchler, hereby certify that on the 5th day of July, 1996, a copy of the foregoing NYNEX Petition For Reconsideration in CC Docket No. 96-46 was served on each of the parties listed on the attached Service List by first class U.S. mail, postage prepaid, and where indicated with an asterisk, were served by-hand delivery.


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